Abdul Latif bin Mohamed Ibrahim v International Factors Leasing Pte Ltd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–543 OF 1999

HAIDAR, ABDUL HAMID MOHAMAD AND ABDUL KADIR SULAIMAN JJCA

10 MARCH 2001

Civil Procedure *— Foreign judgment — Delay in filing application to set aside the foreign judgment — Whether there must be some material upon which the court can exercise its discretion to extend time*

On or about 4 August 1994, the respondent granted a loan in the sum of SD1.9m to Winds Cruises Pte Ltd ('Winds Cruises'). The loan was guaranteed by the appellant pursuant to a guarantee dated 4 August 1993. Winds Cruises defaulted in the repayment of the loan. The respondent commenced proceedings in the High Court of Singapore against the appellant. On 19 September 1994, summary judgment was entered against the appellant. On 29 November 1994, the Singapore judgment was registered in the High Court of Malaya at Kuala Lumpur. The order dated 29 November 1994 and the notice to judgment debtor of the registration of the foreign judgment dated 11 January 1995 were served personally on the appellant on 12 January 1995. The service was effected by one Mahamud bin Monsor, a clerk of Messrs Shook Lin & Bok. This is an appeal against the decision of the learned judge affirming the decision of the senior assistant registrar ('the SAR') who dismissed the appellant's summons to set aside the registration of a Singapore High Court judgment. The application of the appellant was dismissed by the SAR solely on the ground of delay in filing the application for extension of time to file the application to set aside the Singapore judgment. According to the notice of the registration of the foreign judgment issued by the High Court at Kuala Lumpur, the appellant was given liberty to apply to set aside the said registration within 14 days after service upon him at his last known address. The appellant alleged that he was never served with the registration order.

Held, dismissing the appeal:

'The Rules of Court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation' (see p 376E); *Ratnam v Cumarasamy & Anor* [1965] 31 MLJ 228 followed. The court below has the jurisdiction to decide whether it was a fact or not that service of those documents were effected personally on the appellant by Mahamud. In fact, Mahamud had sworn a full and complete evidence of service. The burden falls on the appellant to show otherwise and the

best way to do so is by invoking O 38 r 2(3) of Rules of the High Court 1980 ('the RHC'). Mere denial does not help the appellant. As the appellant failed to invoke O 38 r 2(3) of RHC, the learned judge was on the material before him entitled to come to his own finding that these documents were indeed served on him by Mahamud (see pp 375G–H, I–376A).

[**Bahasa Malaysia summary**

Pada atau lebih kurang pada 4 Ogos 1994, responden telah memberikan satu pinjaman berjumlah SD1.9j kepada Winds Cruises Pte Ltd ('Winds Cruises'). Pinjaman tersebut telah dijaminkan oleh perayu menurut satu jaminan bertarikh 4 Ogos 1993. Winds Cruises gagal dalam pembayaran pinjaman tersebut. Responden telah memulakan prosiding di Mahkamah Tinggi di Singapura terhadap perayu. Pada 19 September 1994, penghakiman terus telah dimasuki terhadap perayu. Pada 29 November 1994, penghakiman Singapura tersebut telah didaftarkan di Mahkamah Tinggi Malaya di Kuala Lumpur. Perintah bertarikh 29 November 1994 dan notis kepada penghutang penghakiman terhadap pendaftaran penghakiman luar negara bertarikh 11 Januari 1995 telah disampaikan secara ke diri atas perayu pada 12 Januari 1995. Penyampaian tersebut telah dilaksanakan oleh seorang Mahamud bin Mansur, seorang kerani di Tetuan Shook Lin & Bok. Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana mengesahkan keputusan penolong kanan pendaftar ('PKP tersebut') yang telah menolak saman perayu untuk mengenepikan pendaftaran satu penghakiman Mahkamah Tinggi Singapura. Permohonan perayu telah ditolak oleh PKP tersebut semata-mata atas alasan kelewatan memfailkan lanjutan masa untuk memfailkan permohonan untuk mengenepikan penghakiman Singapura tersebut. Menurut notis pendaftaran penghakiman luar negara yang dikeluarkan oleh Mahkamah Tinggi di Kuala Lumpur, perayu telah diberikan kebebasan untuk memohon untuk mengenepikan pendaftaran tersebut dalam tempoh 14 hari selepas penyampaian ke atas beliau di alamat terakhir beliau. Perayu mendakwa bahawa beliau tidak pernah disampaikan perintah pendaftaran tersebut.

Diputuskan, menolak rayuan tersebut:
'Kaedah-Kaedah Mahkamah mestilah prima facie dipatuhi, dan bagi tujuan memberi justifikasi untuk mahkamah melanjutkan masa di mana beberapa langkah prosedur perlu diambil, sepatutnya terdapat beberapa bahan di mana mahkamah boleh menggunakan budi bicaranya. Jika undang-undang adalah sebaliknya, satu pihak yang telah melakukan pelanggaran akan mempunyia hak tidak bersyarat terhadap satu lanjutan masa yang akan menggagalkan tujuan kaedah-kaedah tersebut yang memperuntukkan satu jadual masa untuk mengendalikan litigasi' (lihat ms 376E); *Ratnam v Cumarasamy & Anor* [1965] 31 MLJ 228 diikut. Mahkamah rendah mempunyai

bidang kuasa untuk memutuskan sama ada ia merupakan satu fakta atau tidak bahawa penyampaian dokumen-dokumen tersebut telah dilaksanakan secara ke diri ke atas perayu oleh Mahamud. Sebenarnya, Mahamud telah mengangkat sumpah satu keterangan penyampaian yang penuh dan sempurna. Beban terletak atas perayu untuk menunjukkan sebaliknya dan cara terbaik untuk berbuat demikian adalah dengan menggunakan A 38 k 2(3) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT tersebut'). Hanya penafian tidak akan membantu perayu. Memandangkan perayu telah gagal untuk menggunakan A 38 k 2(3) KMT tersebut, hakim yang bijaksana mempunyai bahan di hadapan beliau yang membolehkan beliau tiba kepada penemuan beliau sendiri bahawa dokumen-dokumen tersebut sememangnya telah disampaikan oleh Mahamud (lihat ms 375G–H, I–376A).]

Notes

For cases on foreign judgment generally, see 2(2) Mallal's Digest (4th Ed, 1998 Reissue) paras 2592–2606.

Cases referred to

DP Vijandran v Majlis Peguam [1995] 3 MLJ 576 (refd)
Gomez v Gomez [1969] 1 MLJ 228 (refd)
Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 (refd)
Ratnam v Cumarasamy & Anor [1965] 31 MLJ 228 (folld)
RHB–Cathay Securities Pte Ltd v Lim Bee Keong [1999] 5 MLJ 641 (refd)
Tan Ah Chai v Loke Jee Yah [1998] 4 CLJ 73 (refd)

Legislation referred to

Reciprocal Enforcement of Judgements Act 1958 s 5
Rules of the High Court 1980 O 3 r 5(1), (2), O 14, O 38 rr 1, 2(3), O 67 rr 5(3), 7
Rules of the Supreme Courts O 38 r 1

Appeal from: Originating Summons No R3–106–1994 (High Court, Kuala Lumpur)

RR Sethu (*RR Sethu*) for the appellant.
Teng Chong Moi (*Shook Lin & Bok*) for the respondent.

Haidar JCA. (delivering judgment of the court: This is an appeal against the decision of the learned judge affirming the decision of the senior assistant registrar ('the SAR') who dismissed the appellant's summons to set aside the registration of a Singapore High Court judgment obtained by the respondent.

Background facts

On or about 4 August 1994, the respondent granted a loan in the sum of SD1.9m to Winds Cruises Pte Ltd ('Winds Cruises'). The loan was

guaranteed by, inter alia, the appellant pursuant to a guarantee dated 4 August 1993. A

Winds Cruises defaulted in the said loan.

The respondent commenced proceedings in the High Court of Singapore vide writ no 967 on 16 June 1994 against, inter alia, the appellant [cited as the sixth defendant] pursuant to the guarantee dated 4 August 1993 executed by him as a director of Winds Cruises ('Singapore proceedings'). The appellant did not deny the execution of the guarantee. B

The respondent purportedly served the sealed writ on the appellant by a letter dated 4 July 1994 sent by AR registered post through its solicitors in Singapore at the appellant's address in Kuala Lumpur. C

Appearance was purportedly entered on the appellant's behalf by a firm of solicitors in Singapore on 9 July 1994 under the authority to act, signed by one Wee Toon Boon, the seventh defendant, on his behalf.

The respondent thereafter filed an application under O 14 in the Singapore proceedings for final judgment against, inter alia, the appellant. D

On 19 September 1994, summary judgment was entered against the appellant for the sum of SD1,968,335.36 as at May 1994, and interest on the said sum at the default rate of 18%pa and accumulated by way of compound interest with monthly rests from 1 June 1994 until payment ('Singapore judgment'). E

On 29 November 1994, the Singapore judgment was registered in the High Court of Malaya at Kuala Lumpur. The order dated 29 November 1994 and the notice to judgment debtor of the registration of the foreign judgment dated 11 January 1995, were served personally on the appellant on 12 January 1995 vide a letter dated 11 January 1995 from Messrs Shook Lin & Bok, advocates & solicitors here. The service was effected by one Mahamud bin Mansor, a clerk of Messrs Shook Lin & Bok F

At the time of the application to set aside the order of the registration of the Singapore judgment, no attempt was made by the appellant to set aside the Singapore judgment. G

Be that as it may, we now proceed to consider the application of the appellant that was dismissed in the court below, and which is the subject matter of the appeal before us.

The application H

In his application, the appellant prayed for, inter alia:

(i) extension of time to file the application to set aside the Singapore judgment;

(ii) that the registration of the Singapore judgment be set aside pursuant to s 5 of the Reciprocal Enforcement of Judgements Act 1958 ('the Act') and O 67 of the Rules of the High Court 1980 ('the RHC'). I

Extension of time to file the application

It would appear that the application of the appellant was dismissed by the SAR solely on the ground of delay in filing the application for extension. The learned judge held that the SAR had rightfully exercised her discretion not to grant an extension of time. According to the learned judge, the length of delay and the reasons for the delay was purely the doing of the appellant.

The issue before us is whether the court below had correctly exercised the discretion not to grant an extension of time.

We shall deal first with the learned judge's construction of O 67 r 5(3) of the RHC which reads:

> The Court may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period (either as originally fixed or as subsequently extended) within which an application to have the registration set aside may be made.

According to the notice of the registration of the foreign judgment issued by the High Court at Kuala Lumpur, the appellant was given liberty to apply to set aside the said registration within 14 days after service upon him at his last known address, at No 1530 Jalan Kasawari, Taman Ulu Kelang Ampang, 68000 Kuala Lumpur, of notice of such registration pursuant to O 67 r 7 of the RHC, or upon any of the grounds set out in s 5 of the Act.

According to the learned judge, as the notice to the appellant on the registration of the Singaporean judgment was served on him on 12 January 1995 vide affidavit of service of Mahmud bin Mansur dated 13 January 1995, in order for him to set aside the registration of the Singaporean judgment he has to file the application on or before 26 January 1995, that is, 14 days from 12 January 1995. In this case, the appellant filed the application on 27 January 1998.

The learned judge, after considering the effect of the specific provision of O 67 r 5(3) of the RHC vis-à-vis the general provision of O 3 r 5 of the RHC and applying the principle in *Tan Ah Chai v Loke Jee Yah* [1998] 4 CLJ 73 and *DP Vijandran v Majlis Peguam* [1995] 3 MLJ 576, came to a finding that the specific provision must be read as a proviso to the general provision for an extension of time. He concluded thus:

> The sixth defendant must file the application for an extension of time within the time while it remained competent for the sixth defendant to set aside the registration. Hence, the application for an extension of time should have been made on or before 26 January 1995.

With respect, we disagree for the following reasons:

(a) The facts/issues in *Tan Ah Chai* and *DP Vijandran* are different and are of no assistance to the facts/issues in this case.

(b) The word 'competent' relates to the status of the party, ie if the applicant is declared a bankrupt, as contended by Dato RR Sethu, counsel for the appellant, and which we tend to agree with.

(c) Order 3 r 5 of the RHC clearly provides the answer:

(i) Order 3 r 5(1) of the RHC gives the power to the court to extend the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

(ii) Order 3 r 5(2) of the RHC clearly gives the power to the court to extend any such period as is referred to in O 3 r 5(1) of the RHC although the application for extension is not made until after the expiration of the period.

In the result, we are of the view that the appellant was competent to file the application even after the expiry of the period ordered by the court.

It is then a matter for us to consider whether the appellant has placed sufficient material or grounds for the court to exercise its discretion in his favor on the delay in making the application.

For a start, it is trite law that an appellate court should be slow to disturb the exercise of the discretionary power of the trial court.

This court in dealing with the delay point in *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396, said at p 401:

> It is a cardinal principle of law that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

The burden therefore falls on the appellant to render a satisfactory explanation or to lay sufficient material for the court to consider the delay in making the application for an extension of time. The learned judge stated that no explanation was given in the affidavit of the appellant in support of the application as to why an application for an extension of time was not made since 26 January 1995. The learned judge further stated that it was only in rebuttal that the appellant said:

(i) he was never served with the registration order;

(ii) it was not his signature

(iii) he did not know of the order (judgment) only 17 April 1997.

We have examined the affidavit of the appellant in support of the application and agree with the learned judge's finding that there was no explanation for the delay in filing for an extension of time seeking to set aside the registration of the Singapore judgment other than in rebuttal. The grounds put forward were more on the attack of the Singapore judgment.

The learned judge found, as a fact, that there was evidence to show that the appellant had been served with the registration order of the Singapore judgment. This evidence was by way of the affidavit of service of Mahamud

bin Mansor, a clerk of Messrs Shook Lin & Bok, advocates & solicitors in Kuala Lumpur, acting for their counterpart in Singapore. This is what Mahamud stated at para 2 of his affidavit:

> Encik Abdul Latiff bin Mahamud Ibrahim telah mengaku kepada saya bahawa beliau adalah penama yang tercatit di dalam notis berkenaan dan menandatangani penerimaan pada salinan pruf perintah, notis dan surat iringan yang disertakan di sini masing-masing bertanda eksh 'MM-1', 'MM-2' dan 'MM-3'.

However, the appellant in his affidavit in reply dated 14 April 1998, denied service of the documents on him as claimed by Mahamud. The appellant said he never signed the letter (exh 'MM-3'). The alleged signature was not his. Hence, he was unable to set aside the registration of the judgment within the stipulated time since he only had knowledge of the said judgment on 17 April 1997 and he needed time to get to the root of it and had to appoint solicitors in Singapore.

Dato RR Sethu, counsel for the appellant, therefore submitted that in the face of the denial by the appellant in respect of his alleged signature and in the absence of cross examination, it was not possible to make such a finding. He further submitted that despite the appellant's denial, Mahamud was not asked to swear fuller and more complete evidence of service. There was no evidence that the appellant was personally known to Mahamud or that someone else had pointed out the appellant to Mahamud.

In our opinion, as the issue relates only to the service of the documents on the appellant and not a question to be tried in the action, it was open to the appellant to cross examine Mahamud on the contents of his affidavit on the service issue. This he could have done by seeking leave of the court pursuant to O 38 r 2(3) of the RHC. Raja Azlan Shah J (as His Royal Highness then was) had the occasion to consider O 38 r 1 of the Rules of Supreme Court 1957 (which is our present O 38 r 2(3) of the RHC) and its application in *Gomez v Gomez* [1969] 1 MLJ 228 at p 229:

> It is also settled law that if the issue in the case relates, not to converted facts appearing on the face of the affidavits but to an issue which must be tried in the action, then O 38 r 1 does not apply; see *Abrahams & Co v Dunlop Pneumatic Tyre Company & Ors* [1905] 1 KB 46, 52 where Mathew LJ in considering the provisions of the (English) O 38 r 1, which is the same as ours said:
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> > 'That applies only to a question of fact which the court or a judge has at the time jurisdiction to decide, and not to a question to be tried in the action.'

In this case, the court below has the jurisdiction to decide whether it was a fact or not that service of those documents were effected personally on the appellant by Mahamud. In fact, Mahamud, in our view, had sworn a full and complete evidence of service. It was not necessary for evidence to be shown that the appellant was known personally by Mahamud or that someone else had pointed out the appellant to Mahamud as contended by Dato RR Sethu in the face of the admission by the appellant as deposed by Mahamud that he was the person named in those documents. The burden then falls on the appellant to show otherwise and the best way to do so is by invoking O 38 r 2(3) of the RHC. Mere denial does not help the appellant.

He did not say, for example, the material time of the service of those documents. He was not at the stated address but was somewhere else or he had changed his address. With the benefit of the cross examination of Mahamud, only then would the court be in a position to come to a finding whether Mahamud's affidavit could be accepted or not.

As the appellant failed to invoke O 38 r 2(3) of the RHC, the learned judge, in our view, was on the material before him, entitled to come to his own finding that these documents were indeed served on him by Mahamud. There was delay of about three years.

By his own affidavit dated 24 January 1998, the appellant, at para 28, admitted that he was made aware of the Singapore judgment on 17 April 1997 by Messrs Syed Ibrahim, and he needed time to appoint solicitors in Singapore to get the documents, and all this took time. The learned judge stated that all the relevant facts were then known to him, and yet he did not take immediate steps to set aside the Singapore judgment.

We do not propose to go into minute details of the appellant's conduct regarding the delay, and suffice for us to say that the learned judge was correct when he said 'The length of delay and the reason for the delay was purely the doing of the sixth defendant'.

We must caution the litigants of the importance and need to comply with the Rules of Court and we quote what Lord Guest said in *Ratnam v Cumarasamy & Anor* [1965] 31 MLJ 228 at p 229:

> The Rules of Court must prima facie be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

For the reason stated, we see no grounds for us to disturb the decision of the learned judge when he affirmed the decision of the SAR in refusing the application for an extension of time by the appellant.

On this ground alone, the appeal should be dismissed.

We do not see the need for the learned judge to consider the merits of the application once he ruled that the application for the extension of time was rightly refused by the SAR. Hence, we do not propose to consider the merits of the application in view of our decision on the extension of time. We agree with the learned judge in *RHB–Cathay Securities Pte Ltd v Lim Bee Keong* [1999] 5 MLJ 641 that once the prayer for an extension of time was dismissed, the other application for setting aside the foreign judgment did not arise.

In the circumstances, we dismiss the appeal on this ground alone with costs. The order of the High Court is affirmed. Deposit to the respondent on account of taxed costs.

Appeal dismissed.

Reported by Benjamin Yong